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No. 85-2068

In The
Supreme Court of the United States
October Term, 1985

CONSTABLE WALTER H. RANKIN
and HARRIS COUNTY, TEXAS,

Petitioners,

v.

ARDITH McPHERSON,

Respondent.

On Writ of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Neither decisions below nor the record raise the second question presented by petitioners. Respondent was employed only as a clerk-typist, and not as a "law enforcement officer." Petitioner Rankin is a Constable, not a "law enforcement officer," and has no direct law enforcement role.

To reflect the facts and the record accurately, the question in this case should be presented as follows:

> Does a Deputy Constable employed as a clerk-typist lose her constitutional right to speak out on matters of public concern merely because she is deputized?

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BRIEF IN OPPOSITION

Respondent agrees with petitioners' reference to the opinions delivered below, and with petitioners' statement of grounds invoking jurisdiction of the Supreme Court, and with petitioners' statement of constitutional and statutory provisions involved.

STATEMENT OF THE CASE

This case concerns respondent's claim that she was terminated from her public employment in violation of her constitutionally protected right to freedom of speech.

There is no issue or question regarding the subject matter of respondent's statement, or regarding whether the statement is the basis for the termination of her employment. All parties agree that petitioners fired respondent strictly because of her statement. All parties agree that respondent's statement was, "I hope if they go for him again, they get him." The District Court specifically held that the statement did not constitute a criminal violation. (See Appendix A).

Neither the position that respondent held with the Constable's office nor the activities of the Constable's office were disrupted or interrupted in any way by respondent's comment. In fact, three witnesses testified that work continued during and after respondent's statement.

There is also no argument among the parties concerning the nature of respondent's employment. Despite petitioners' repeated efforts to characterize respondent as a "law enforcement officer," the record and evidence clearly establish respondent actually served only as one of a dozen clerk-typists. It is agreed among the parties that respondent was *not* a peace officer and was *not* trained in any "law enforcement" capacity. She simply fed information about the service of *civil* process into a pre-programmed computer system utilized county-wide to monitor the status of civil papers. She served no function within the criminal justice system, and the computers she

utilized also served no function within the criminal justice system. She worked in a back room, off limits to the general public. Respondent processed public information and did not work with sensitive information. She did not work directly or closely with the Constable.

Petitioners make much of the fact that respondent's job title was "deputy constable." In fact, the record reveals that the title of "deputy" is nothing more than an artifact of Texas law which permits constables to hire only "deputies."

In their Petition for Writ of Certiorari, petitioners continue to mischaracterize the constable's office as a "law enforcement office." Yet in trial, the Constable testified that over 80% of the functions of his office are devoted to service of civil papers, juvenile court services, and mental health warrants. The only criminal activity with which the Constable's office concerns itself is the service of warrants in petty misdemeanor cases, such as "bad" check cases. In fact, the Constable testified that no fingerprint checks or criminal clearances are required of clerk-typists hired by his office.

The Constable also testified that his precinct is located entirely within the city limits of Houston and neighboring cities, where city police and sheriff departments are responsible for law enforcement.

———o———

REASONS FOR DENYING THE WRIT

This case presents no special or important reason to grant the writ of certiorari. Respondent has broken no

new legal ground in this case; the First Amendment is a solid basis and legal precedent a convincing reason for denial of this petition.

The decision of the Court of Appeals for the Fifth Circuit faithfully follows precedent of the Court. *Connick v. Myers,* 461 U.S. 138 (1983); *Pickering v. Board of Education,* 391 U.S. 563 (1968). The Fifth Circuit decision is also consistent with the appeal court's application of *Connick. Gonzalez v. Benavides,* 774 F.2d 1295 (5th Cir. 1985) *cert. denied,* — U.S. —, 54 U.S.L.W. 3176 (U.S. Apr. 28, 1986) (No. 85-1234); *McBee v. Jim Hogg County, Texas,* 730 F.2d 1009, 1013 (5th Cir. 1984).

The Court has not retreated from its decision in *Connick.* See *Bose Corp. v. Consumers Union of U.S., Inc.,* 466 U.S. 485, 505 n.22 (1984).

Respondent could not be fired from her public employment for exercise of her constitutional rights. *Mt. Healthy City School Dist. Board of Ed. v. Doyle,* 429 U.S. 274, 283 (1977); *Perry v. Sindermann,* 408 U.S. 593, 597 (1972).

Whether respondent's statement is protected under the First Amendment is a question of law, but application of the decision of this Court in *Connick* is essential. If the comment made by respondent is deemed to concern itself with matters of public concern, then the speech is protected, and the balance between the employee's right to free speech and the employer's interest in a functioning public office must be struck. *Pickering v. Board of Education,* 391 U.S. 563 (1968). Respondent's comment clearly addressed a matter of public concern. Respondent's state-

ment concerned itself with her opinion of the political and economic policies of the administration of President Ronald Reagan. Her statement did not disrupt or interrupt the functioning of the office in which she worked.

Her statement in no way constituted a criminal offense, although it may be offensive to others. Petitioners violated respondent's right to freedom of speech under well established law.

CONCLUSION

The Court should deny the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-81-1442

ARDITH McPHERSON,
Plaintiff,

vs.

WALTER RANKIN and HARRIS COUNTY,
Defendants

ORDER

After careful consideration of the pleadings, especially Plaintiff's motion for summary judgment and Defendants' response thereto, the Court believes this case should be decided on cross-motions for summary judgment. Therefore, a hearing is hereby set for 9:30 a.m., on January 28, 1983. The purpose of the evidentiary hearing will be to determine whether Plaintiff's comment on March 30, 1981, pertaining to an assassination attempt on President Reagan, was protected speech.

The Court is convinced that Plaintiff's comment in no way constituted a violation of either 18 U.S.C. 2385 or 18 U.S.C. § 871(a). Therefore, to apply the balancing test required by *Pickering v. Board of Education*, 391 U.S. 563 (1968), the Court needs to hear testimony regarding the details of this incident, the intent and motivation of those involved, and the extent to which such speech by one in Plaintiff's position affects the ability of the constable's office to perform its services efficiently. The

Court is also concerned as to the applicability of *Weisbrod v. Donigan,* 651 F.2d 334 (5th Cir. 1981), rehearing denied, 659 F.2d 1079, and *Garza v. Rodriguez,* 559 F.2d 259 (5th Cir. 1977), *cert. denied,* 439 U.S. 877 (1978).

Done at Houston, Texas, this 10th day of January, 1986.

/s/ Norman Black
United States District Judge